KAREN P. HEWITT
United States Attorney
A. DALE BLANKENSHIP
Assistant United States Attorney
California State Bar No. 235960
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-6199/(619) 235-2757 (Fax)
Email: Dale.Blankenship@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RICARDO IVAN PALOS-MARQUEZ, Defendant.	)	Criminal Case 08CR0547-JM DATE: April 11, 2008 TIME: 11:00 a.m. **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS TO:** **1) DISMISS COUNT ONE DUE TO VINDICTIVENESS;** **2) SUPPRESS EVIDENCE OF AUGUST 7, 2007, VEHICLE STOP;** **3) SUPPRESS EVIDENCE OF FEBRUARY 7, 2008, VEHICLE STOP;** **4) DISMISS INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY;** **5) SUPPRESS STATEMENTS;** **6) PRESERVE EVIDENCE;** **7) COMPEL DISCOVERY; AND** **8) GRANT LEAVE TO FILE FURTHER MOTIONS.** **TOGETHER WITH STATEMENT OF FACTS, MEMORANDUM OF POINTS AND AUTHORITIES**

COMES NOW the plaintiff, United States of America, by and through its counsel, Karen P. Hewitt, United States Attorney, A. Dale Blankenship, Assistant United States Attorney, and hereby files the attached memorandum of points and authorities in response and opposition to Defendant's motions to compel discovery and grant leave to file further motions.

I

STATEMENT OF THE CASE

On February 27, 2008, a federal grand jury for the Southern District of California returned a five-count Indictment, charging Defendant, Ricardo Ivan Palos-Marquez, with transportation of illegal aliens and aiding and abetting, in violation of 8 U.S.C. § 1324(a)(2)(A)(ii) and (v)(II). Defendant was arraigned on the Indictment on February 28, 2008, and entered a not guilty plea.

II

STATEMENT OF FACTS

A. IMMIGRATION HISTORY

Defendant is a citizen of Mexico and a legal permanent resident of the United States.

B. CRIMINAL AND ARREST HISTORY

Defendant was apprehended on April 18, 2006, while transporting 25 illegal aliens along with two other co-principals. He was not prosecuted for this offense. On February 3, 2008, Defendant was apprehended with a group of 8 illegal aliens who fled from border patrol agents in a pick-up truck. Defendant was with the aliens hiding nearby the recently abandoned truck when he was apprehended. Defendant was not prosecuted for this offense.

C. INSTANT OFFENSE - FEBRUARY 7, 2008

On February 7, 2008, at approximately 5:00 p.m., United States Border Patrol Agent Myles Staunton was traveling eastbound on Otay Lakes Road. Agent Staunton passed an area known as the "Riding and Hiking Gate." This is a very desolate, remote, and unpopulated area. This area is located approximately 3 miles east of the Otay Mesa, California, Port of Entry and approximately 5 miles north of the international border. This area is commonly used by illegal aliens to further their entry into the United States. This area is also commonly used by alien smugglers to pick up illegal aliens and transport them to locations within the United States .

Approximately 250 yards east of the "Riding and Hiking Gate", Agent Staunton approached a sharp right corner that has no visibility of oncoming traffic. While traveling through the corner, a green Dodge Ram pick-up truck was driving westbound in the eastbound lane through the blind corner. The Dodge Ram was passing a UPS carrier van. Agent Staunton applied his brakes and veered right to avoid a head-on collision with the pick-up. The UPS driver gestured toward the pick-up truck. Based upon his knowledge of the area and the gesturing of the UPS driver, Agent Staunton suspected that the pick-up was involved in illegal activity,

Agent Staunton notified Agents Simon and Martinez via service radio that he believed the pick-up was involved in illegal activity. Agents Simon advised Agent Staunton that the UPS driver stopped at their position and advised them that he saw the pick-up stop and load four individuals who were standing on the side of the road. Agent Staunton aired a description of the vehicle, and the direction of travel. Agent Staunton made a u-turn and began traveling westbound on Otay Lakes Road. Agent Staunton made contact with Agent Ray Padron via radio and traveled to the location where Agent Padron stopped the Defendant, Ricardo Ivan Palos-Marquez.

Agent Simon and Martinez were parked at the “Riding and Hiking Gate” on the south side of Otay Lakes road, when they received the radio call from Agent Staunton regarding the pick-up truck. Agent Simon and Martinez saw the green pick-up truck pass their location at a high rate of speed. Moments later, the UPS driver pulled over where Agents Simon and Martinez were parked. The UPS driver told the agents that he observed the green pick-up truck stop on the side of the road and load several individuals into the pick-up. Agents Simon and Martinez began traveling westbound but lost visual contact with the pick-up. Agent Simon contacted Agent Ray Padron and advised him of the vehicle description and direction of travel. Agents Simon and Martinez received word back from Agent Padron that he conducted a vehicle stop and they proceeded to that location.

Agent Padron received the radio call about the pick-up truck from Agent Simon at about the same time the pick-up truck was passing his location. Agent Padron began following the pick-up and called the dispatch to run checks on the vehicle registration. After receiving vehicle checks from dispatch, Agent Padron activated his emergency lights and sirens and initiated a vehicle stop. Agent Padron approached the vehicle on the drivers side. Agent Padron asked the driver, Ricardo Ivan Palo-Marquez, his citizenship and the driver stated that he is a citizen of Mexico and a legal permanent resident of the United States.

Agent Padron observed four individuals laying down in the back seat of the passenger bay. Agent Padron asked each of the passengers their citizenship and each stated that they are citizens of

Mexico without documents to enter or reside in the United States. Agent Padron apprehended the Defendant and transported Defendant and the material witnesses to the Border Patrol Station for processing.

1. Defendant's Statement

Agent Elliot Gallina advised Defendant of his Miranda rights at approximately 11:00 p.m. and Defendant waived his rights and agreed to make a statement. Senior Patrol Agent Juan Angeli and Agent Cesar Martinez witnessed the rights advisement and subsequent statement made by Defendant. Defendant stated that he was a lawfully admitted permanent resident but that he lost his card. Defendant stated that he made arrangements with a person to transport aliens. Although he has known the person with whom he made the arrangements to smuggle the aliens for five years, he did not know this person's name. Defendant stated that he met the person in City Heights, at an Exxon gas station prior to the alien smuggling event, and that he agreed to smuggle the aliens for $50.00 per person.

Defendant stated that he has smuggled illegal aliens 6 times previously, and that he had been arrested on 3 of those occasions. Defendant stated that each smuggling event was coordinated by a different person. Defendant stated that he was not the owner of the pick-up, and he did not know the pick-up owner. Defendant stated that he knew that the people he was transporting were in the United States illegally and he stated that he was transporting them in exchange for compensation.

2. Material Witnesses' Statements

Border Patrol Agents interviewed the material witnesses: Apolinar Santos-DeAsis; Perfecto Toto-Cruz; Vicente Alvarado-Victoria; and Francisco Diego-Benabe. Each of the material witnesses stated that they are citizens of Mexico without documents that would allow them to enter or remain in the United States lawfully. Two of the material witnesses, Vicente Alvarado-Victoria and Francisco Diego-Benabe, stated that they made arrangements to be smuggled into the United States and that they were led through the mountains by a foot-guide. Both of these material witnesses stated that others were paying on their behalf between $1500.00 and $1800.00 to be smuggled to destinations inside the United States.

//

The material witnesses Perfecto Toto-Cruz and Apolinar Santos-DeAsis, both denied being led through the mountains by a foot-guide. These material witnesses also denied making arrangements with a smuggling organization to be transported to their destinations in the United States.

D. PRIOR OFFENSE - AUGUST 7, 2007

On August 7, 2008, United States Border Patrol Agents with the Smuggling Interdiction Group were performing anti-smuggling operations near Pine Valley, California. Pine Valley is located approximately 12 miles north and 12 miles east of the Tecate, California, Port of Entry. Agents were conducting operations in unmarked vehicles and in plain clothes.

At approximately 9:30 p.m., Agent Sean Wilson was in a stationary position on the westbound lanes of Interstate 8, approximately 2 miles east of the Japatul Valley Road Exit when he observed a white Ford Explorer pass his location. Agent Wilson noticed that the vehicle was riding extremely low to the ground as if it was carrying a heavy load in the cargo area. Alien smugglers often use sport utility vehicles to smuggle large numbers of illegal aliens. Agent Wilson noticed the driver and passenger sitting in the front seats wearing their safety belts. Agent Wilson began following the SUV and while doing so, he called in the vehicle license plate, California license plate number 4BDN091. Border Patrol dispatch personnel responded that the vehicle registration information revealed a pending master file in the name of either Alfredo or Christian Jimenez-Aguilar with the address of 3724 Dalbergia Street, San Diego, California. A pending master file indicates to agents that the vehicle may have been the subject of numerous releases of liability. It is common for vehicles used in alien smuggling to be transferred between numerous individuals.

Agent Wilson observed the vehicle travel in and out of the designated lane of travel. Agent Wilson also observed the vehicle sway from side to side as if heavily laden. Agent Wilson believed that the swaying was caused by extra weight inside the vehicle, because there was no wind to cause the vehicle to move in that manner. While Agent Wilson was following the vehicle, he observed a human head emerge from the backseat and then quickly disappear. Agent Wilson continued to follow the vehicle and he radioed his observations to other agents in the area.

At approximately 10:00 p.m., Agent Brian Wakefield conducted a vehicle stop using his emergency lights and sirens. The vehicle continued traveling approximately 1 mile before pulling to the center shoulder of the Interstate 8. Agent Wakefield and Agent Wilson approached the vehicle and observed 4 people in the cargo area of the vehicle and 3 people in the back seat area of the vehicle all 7 of these individuals were attempting to conceal themselves. Each of the passengers stated that they were citizens of Mexico without documents that would allow them to remain in the United States lawfully.

The driver of the vehicle was Defendant, Ricardo Ivan Palos-Marquez. Defendant and the passengers were transported to the El Cajon Border Patrol Station for processing. Each of the passengers was questioned and then voluntarily returned to Mexico except for Eliot Moya-Mendoza, who was identified as having a criminal record.

1. Defendant's Statement

Agent Wilson advised Defendant of his Miranda rights at approximately 1:00 a.m., and Defendant waived his rights and agreed to speak with the agents. Defendant stated that he was working as an alien smuggler for the last 2 years in the areas of Pine Valley and Jamul. Defendant stated that he was recently apprehended while accompanying a pair of alien smugglers in the Jamul area. Defendant stated that he was in training at the time and he was learning the routes of travel and how to spot anti-smuggling agents. Defendant was smuggling 25 illegal aliens on that occasion, and he was working for the "Calixtos". Defendant was to transport the 25 aliens to Corona, California. Defendant stated that the "Calixtos" contact him with the time, date, and place where the aliens are to be picked up and he transports the aliens to another smuggler who in turn provides follow-on transportation for the aliens.

Defendant stated that he has transported illegal aliens, usually in groups of 5 to 10, on 2 - 3 occasions per month, for the last 2 years. Defendant stated that the "Calixtos" pay him approximately $75.00 per alien.

2. Material Witness Statement

At the border patrol station, agents determined that one of the smuggled aliens, Elio Moya-Medoza, had a significant criminal history and was previously deported from the United States on August 20, 2002. Elio Moya-Mendoza was advised of his Miranda rights, he waived his rights and agreed to speak with agents. Moya-Mendoza stated that he is a citizen of Mexico, with no documents to enter the United States. Moya-Mendoza stated that he crossed into the United States on August 3, 2007 through the mountains near Tecate, California. Moya-Mendoza also stated that he served time in jail for his prior convictions.

Moya-Mendoza's prior convictions include: infliction of corporal injury on a spouse in violation of California Penal Code § 273.5, 3 years prison; possession of methamphetamine in violation of California Health and Safety Code § 11377(a), 24 months probation; possession of methamphetamine in violation of California Health and Safety Code § 11377(a), 16 months prison; possession of methamphetamine in violation of California Health and Safety Code § 11377(a), 2 years prison.

On September 25, 2007, Moya-Mendoza plead guilty to 3 counts of illegal entry in violation of 8 U.S.C. § 1325; and he was sentenced to 48 months' custody. Moya-Mendoza is currently serving his sentence in Victorville Federal Correctional Complex.

III

GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS WITH POINTS AND AUTHORITIES

A. DISMISS INDICTMENT DUE TO VINDICTIVE PROSECUTION

A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 (9th Cir. 2001); United States v. Gastelum-Almeida, 298 F.3d 1167 (9th Cir. 2002). To establish a claim of vindictive prosecution, the defendant must make an initial showing that charges were added because the accused exercised a statutory, procedural, or constitutional right. See United States v. Garza-Juarez, 992 F.2d 896, 906 (9th Cir. 1993).

Defendant's reliance on United States v. Jenkins, 504 F.3d 694 (9thCir. 2007), is distinguishable from the facts of the instant case. In Jenkins, the defendant was indicted for importation of marijuana and at trial she took the stand and testified that she was unaware of the marijuana in vehicle but believed that she was smuggling undocumented aliens. Jenkins 504 F.3d at 698. The Government charged the defendant with alien smuggling only after her testimony during the trial on the marijuana charges. Id. In determining that the Government's actions gave rise to the presumption of vindictiveness, the court stated that the defendant "must demonstrate a reasonable likelihood that the government would not have brought the alien smuggling charges had she not elected to testify at her marijuana smuggling trial and present her theory of the case." Jenkins 504 F.3d at 700. In this case, the Grand Jury returned an indictment only after plea negotiations failed. Defendant's argument that the Government may not pursue additional charges as a result of failed plea negotiations runs counter to prevailing Supreme Court precedent and Defendant's arguments that Jenkins calls for just such a result is without merit.

A presumption of vindictiveness can be overcome by objective evidence that the prosecution was proper. See Garza-Juarez, 992 F.2d at 907-08 (presumption of vindictiveness rebutted by evidence that superseding indictment resulted from failure of plea bargaining process). "Vindictiveness claims are, however, evaluated differently when the additional charges are added during pretrial proceedings, particularly when plea negotiations are ongoing, than when they are added during or after trial." United States v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000). In the context of pretrial negotiations, "vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right." Id. "The prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial," Alabama v. Smith, 490 U.S. 794, 802 (1989), does not create a presumption of vindictive prosecution. See United States v. Goodwin, 457 U.S. 368, 378-81 (1982); Corbitt v. New Jersey, 439 U.S. 212 (1978); United States v. Heldt, 745 F.2d 1275, 1280-81 (9th Cir. 1984). Even assuming the United States did seek to obtain an indictment with additional charges in retaliation for Defendant's refusal to plead guilty, that alone is insufficient to establish vindictive prosecution. United States v. Stewart, 770 F.2d 825, 829 (9th Cir.1985) (citing Heldt, 745 F.2d at 1280), cert. denied, 474 U.S. 1103 (1986); United States v. Allsup, 573 F.2d 1141, 1143 (9th Cir.), cert. denied, 436 U.S. 961 (1978) (holding that bringing additional charges because the defendant was not willing to plea bargain was permissible prosecutorial discretion).

In this case, the parties began negotiating a pre-indictment fast-track plea agreement on or about February 14, 2008, when the Assistant U.S. Attorney assigned to the grand jury section of the U.S. Attorney's Office ("Grand Jury AUSA") sent a plea package, which included an information, plea agreement, plea letter, and acceptance of plea form. [Exhibit 1.] The terms of the agreement called for the Defendant to waive indictment and plead guilty to a one count information alleging a violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II), transportation of illegal aliens and aiding and abetting. The terms of the offer letter required that Defendant accept the offer on or before February 21, 2008. [Exhibit 1, p.5.] Defendant did not accept the offer, and in an effort to persuade Defendant to reconsider, the Grand Jury AUSA informed Defendant's counsel that his client had numerous prior apprehensions. Moreover, on February 22, 2008, the Grand Jury AUSA faxed copies of investigative report summaries relating to Defendant's prior apprehensions. [Exhibit 2.] The Defendant again rejected the pre-indictment offer. On February 27, 2007, the Grand Jury returned an indictment charging Defendant with 5 counts of alien smuggling in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II). The first count related to Defendant's August 7, 2007, apprehension and the remaining counts related to Defendant's February 7, 2008, apprehension.

The facts here are similar to those before the Court in Allsup, Heldt and Gastelum-Almeida, where the defendant claimed vindictive prosecution during the pretrial context when the prosecutor sought the addition of new charges following the defendant's rejection of the prosecutor's plea offer. Allsup, 573 F.2d at 1143; Heldt, 745 F.2d at 1281-82; Gastelum-Almeida, 298 F.3d at 1172. The Ninth Circuit rejected the vindictive prosecution claim and observed that the addition of new charges in the pretrial context is a common occurrence in plea negotiations, and involves nothing improper. Allsup, 573 F.2d at 1143; Heldt, 745 F.2d at 1281-82; Gastelum-Almeida, 298 F.3d at 1172. Defendant presents no authority even suggesting that the United States' actions may be seen as vindictive prosecution, much less that such an act would be an inappropriate response to failure to reach a plea bargain. Defendant was aware of the risk he was taking in refusing the plea offer made in this case. His rejection of the plea offer was freely and voluntarily made. As such, there can be no constitutional violation. Thus, the Court should deny Defendant's motion to dismiss the indictment.

B. IF THE COURT DETERMINES THAT THERE IS A PRESUMPTION OF VINDICTIVENESS IN THIS CASE, THE UNITED STATES SHOULD BE AFFORDED AN OPPORTUNITY TO REBUT SUCH PRESUMPTION

Even assuming that Defendant can somehow demonstrate that there is a presumption of vindictiveness, the burden would then shift to the United States "to show that any increase in the severity of the charges did not stem from a vindictive motive, or was justified by independent reasons or intervening circumstances that dispel the appearance of vindictiveness." United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982); see also Blackledge v. Perry, 417 U.S. 21, 27-29 (1974) (noting that if there is a realistic likelihood of vindictiveness, the prosecution must come forward with evidence justifying the charges). Because of the nature and sensitivity of the intrusion into Government attorney work product and Government deliberative process that would necessarily be required to more fully amplify the "independent reasons or intervening circumstances" (see Gallegos-Curiel, 681 F.2d at 1168) and dispel any possible appearance of vindictiveness and the significant issues surrounding such a pre-trial disclosure, in the event the Court determines that Defendant has satisfied the threshold showing of a presumption of vindictiveness, the United States requests leave to submit additional briefing and other evidence to address the pertinent issues.

C. VEHICLE STOPS WERE BASED UPON REASONABLE SUSPICION

1. February 7, 2008, Apprehension

Defendant next claims that the agents were without reasonable suspicion to stop the vehicle he drove on February 7, 2008. Again, Defendant provides no facts in support of his argument. In this case, Agent Staunton was traveling in a very desolate, remote, and unpopulated area. This area is located approximately 3 miles east of the Otay Mesa, California, Port of Entry and approximately 5 miles north of the international border. This area is commonly used by illegal aliens to further their entry into the United States. This area is also commonly used by alien smugglers to pick up illegal aliens and transport them to locations within the United States. As Agent Staunton approached a sharp right corner the Dodge Ram pick-up truck driven by Defendant was traveling westbound in the eastbound lane through the blind corner. The Dodge Ram was passing a UPS carrier van at the time. Agent Staunton applied his brakes and veered right to avoid a head-on collision with the pick-up. The Agent observed the UPS driver gesture toward the pick-up truck. Later, the UPS driver approached two Border Patrol Agents to report his observations of several individuals loading into the truck from the side of the road these two agents observed the vehicle traveling at a high rate of speed past their position.

The Fourth Amendment protects individuals from unreasonable searches and seizures by the Government. While investigatory stops are permitted, the protections of the Fourth Amendment are extended to the investigatory stops. See Terry v. Ohio, 392 U.S. 1, 9 (1968). In order to have a valid investigatory stop, an officer must have a reasonable suspicion to believe that criminal activity is taking place. United States v. Sokolow, 490 U.S. 1, 7 (1989). Reasonable suspicion exists when an officer is aware of specific, articulable facts, which, together with objective and reasonable inferences, form a basis for suspecting that the particular person to be detained has committed or is about to commit a crime. See United States v. Salinas, 940 F.2d 392, 394 (9th Cir. 1991). Reasonable suspicion need not be inconsistent with innocence. "The relevant inquiry is not whether the particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts." Sokolow, 490 U.S. at 10. In addition, an investigatory stop "may be justified on facts that do not amount to the probable cause required for an arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).

In Sokolow, the United States Supreme Court held the reasonable suspicion analysis is "not readily, or even usefully, reduced into a neat set of legal rules" and like probable cause, takes into account the totality of the circumstances. See Sokolow, 490 U.S. at 7-8. During review, the court must interpret the facts present in light of the officer's training and experience to determine if reasonable suspicion is valid. See Sokolow, 490 U.S. at 8. The seminal case of Brignoni-Ponce, 422 U.S. 873 (1975) is illustrative. In Brignoni-Ponce, the United States Supreme Court recognized the valid public interest in controlling the illegal entry of aliens at the border by stating,

> Because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion...The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

Id. at 881-882. The United States Supreme Court rationalized that "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." Id. at 883.

In addition to recognizing the public interest in controlling the illegal entry at the border and requiring reasonable suspicion for roving stops by the Border Patrol, the Brignoni-Ponce court held that any number of factors may be taken into account when deciding whether there is reasonable suspicion to stop a car in the border area. The Brignoni-Ponce Court further outlined a *non-exclusive list* of factors which Border Patrol agents might permissibly take into account in deciding whether reasonable suspicion exists to stop a car. These non-exclusive factors include: (1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver, including "obvious attempts to evade officers"; (6) appearance or behavior of the passengers; (7) model and appearance of the vehicle; and 8) officers' experience. Brignoni-Ponce, 422 U.S. at 884-85. Under the totality of the circumstances approach, courts should not evaluate reasonable suspicion factors "in isolation from each other...although each of the series of acts [may be] 'perhaps innocent in itself'...taken together, they [may] 'warrant further investigation.'" United States v. Arvizu, 534 U.S. 266, 274 (2002) (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)). In addition, the detaining officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" Arvizu, 534 U.S. at 273. Here, Defendant was driving a vehicle in a area known for alien smuggling crimes that is close to the border. Moreover, Defendant was driving the vehicle in a dangerous manner at a high rate of speed. These factors, coupled with the experience of the officers and the statement of the UPS driver, suggested that alien smuggling may be afoot. This was not an anonymous tip. The UPS driver was provided information to agents, in person, at the same time Defendant was actually perpetrating the crime, under circumstances that provided reasonable suspicion. Defendant's motion should be denied.

2. August 7, 2007, Apprehension

The August 7, 2007, stop likewise was supported by reasonable suspicion. Agent Sean Wilson was in a stationary position on the westbound lanes of Interstate 8, approximately 2 miles east of the Japatul Valley Road Exit when he observed a white Ford Explorer pass his location. Agent Wilson noticed that the vehicle was riding extremely low to the ground as if it was carrying a heavy load in the cargo area. Alien smugglers often use sport utility vehicles to smuggle large numbers of illegal aliens. Agent Wilson began following the SUV and while doing he observed the vehicle travel in and out of the designated lane of travel. Agent Wilson also observed the vehicle sway from side to side as if heavily laden. Agent Wilson believed that the swaying was caused by extra weight inside the vehicle, because there was no wind to cause the vehicle to move in that manner. While Agent Wilson was following the vehicle, he observed a human head emerge from the backseat and then quickly disappear. Agent Wilson continued to follow the vehicle and he radioed his observations to other agents in the area.

Under the totality of the circumstances, the agents had reasonable suspicion to perform a vehicle stop. The agent was in an area known for alien smuggling, he observed Defendant's vehicle swerving and observed that the vehicle appeared to be heavily laden. Contrary to Defendant's assertion, interstate 8 is near the border, in fact it is only 12 miles from the border in the area of Pine Valley. Moreover, the agent observed what appeared to be a human head emerge briefly from the back seat and then hide again. These observations were consistent with alien smuggling and provided adequate reasonable suspicion to conduct the vehicle stop.

D. THE GRAND JURY INSTRUCTIONS WERE NOT FAULTY, AND THE INDICTMENT SHOULD NOT BE DISMISSED

It bears noting that the Hon. John A. Houston and the Hon. Barry Ted Moskowitz, both recently issued a detailed Order analyzing and rejecting all of the arguments Defendant raises here. See Order of Judge Moskowitz, attached as Exhibit F to Defendant's motions; and Order of Judge Houston attached as Exhibit E to Defendant's motions. The United States adopts the reasoning in Judge Moskowitz' previous order and requests that this Court reach the same result. Attached as Exhibit H to Defendant's motion is the "Partial Transcript" of the Grand Jury Proceedings. Attached as Exhibit G to Defendant's motion is a redacted "Supplemental Transcript" which records the relevant portions of the voir dire proceedings.

This Court, and other courts of this district, have repeatedly rejected the arguments raised by Defendant before, and we ask the Court to do so again.

E. DEFENDANT'S MOTIONS TO SUPPRESS THE STATEMENT'S SHOULD BE DENIED

Defendant moves to suppress his post-arrest statements on the ground that they may have been obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Moreover, Defendant requests an evidentiary hearing to determine admissibility and to aid the Court in deciding his suppression motion. Stripped of its lengthy recitation of black-letter law, Defendant's argument contains four specific factual assertions, that Defendant was questioned before being read his Miranda warnings (Def. Mot. at 16); that Defendant felt pressured to speak with agents (Def. Exhibit E); that Defendant did not believe he had the option not to speak with agents (Def. Exhibit E); and that he did not know he could cease questioning. (Def. Exhibit E.) Defendant's declaration is contradicted by his videotaped interview and the signed advisement of rights attached as exhibit 3. [Exhibit 3.] Defendant's motion to suppress statements should be denied without a hearing.

F. Defendant Has Not Made an Adequate Showing for an Evidentiary Hearing

Defendant has failed to present any facts that would warrant an evidentiary hearing, and this Court should deny the motion to suppress statements summarily.

1. The Government Proffer Justifies a Summary Denial of Defendant's Motion

The Ninth Circuit has expressly stated that a Government proffer based on the statement of facts attached to the complaint is alone adequate to defeat a motion to suppress where the defense fails to adduce specific and material facts. United States v. Batiste, 868 F.2d 1089, 1092 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, ... the district court was not required to hold an evidentiary hearing") Since Defendant in this case has failed to provide declarations alleging specific and material facts, the Court would be within its discretion to deny Defendant's motion based solely on the complaint, without any further showing by the Government.

This Court requires litigants to follow Local Rule 47.1(g)(1), which mandates that "[c]riminal motions requiring predicate factual finding shall be supported by declaration(s)." The Rule further provides that "the Court need not grant an evidentiary hearing where either party fails to properly support its motion or opposition." Moreover, the Ninth Circuit has held that a District Court may properly deny a request for an evidentiary hearing on a motion to suppress evidence because the defendant did not properly submit a declaration pursuant to a local rule. United States v. Wardlow, 951 F.2d 1115, 1116 (9th Cir. 1991).

"An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." United States v. Howell, 231 F.3d 616, 620 (9th Cir. 2000); see also United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986) (holding that evidentiary hearings on a motion to suppress are required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural as to whether contested issues of fact exist).

Moreover, a hearing is not required if the grounds for suppression consist solely of conclusory allegations of illegality. United States v. Wilson, 7 F.3d 828, 834-35 (9th Cir. 1993) (holding that District Court Judge Gordon Thompson did not abuse his discretion in denying a request for an evidentiary hearing where the appellant's declaration and points and authorities submitted in support of motion to suppress indicated no contested issues of fact). Boilerplate motions concluding that the United States has the burden of proof to establish adequate warnings of constitutional rights are insufficient to establish that an evidentiary hearing is required. Howell, 231 F.3d at 623; see also Fed. R. Crim. P. 47 (requiring that a motion "shall state the grounds upon which it is made").

Defendant's boilerplate assertions do not demonstrate that there is a disputed factual issue requiring an evidentiary hearing. See Howell, 231 F.3d at 623. Consequently, this Court should deny the request for a hearing and summarily deny the motion to suppress statements.

2. Regardless of the Hearing Determination, Defendant's Post-miranda Confession Should Not Be Suppressed Because He Knowingly and Voluntarily Waived His Rights

If the Court chooses to hold an evidentiary hearing, Defendant's motion to suppress statements should nevertheless be denied, since he made a knowing and voluntary waiver of his rights, free from coercion.

3. A Post-Miranda Statement is Admissible if Defendant Understood His Rights and Chose to Waive Them Voluntarily, Without Official Coercion

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966), and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of rights and that the defendant waived those rights knowingly and intelligently, and not as a result of improper coercion. Colorado v. Connelly, 479 U.S. 157, 167-70 (1986); United States v. Doe, 60 F.3d 544, 546 (9th Cir. 1995). "'Whether there has been a valid waiver depends on the totality of the circumstances, including the background, experience, and conduct of the defendant.'" United States v. Bautista-Avila, 6 F.3d 1360, 1365 (9th Cir. 1994) (quoting United States v. Bernard S., 795 F.2d 749, 751 (9th Cir. 1986)). Evidence that defendants understand their Miranda rights after such rights are explained is the preeminent factor in determining the validity of a waiver. See, e.g., Doe, 60 F.3d at 546 (waiver valid where defendant indicated he understood his rights and agreed to speak with officers); Bautista-Avila, 6 F.3d at 1366; United States v. George, 987 F.2d 1428, 1431 (9th Cir. 1993); Bernard S., 795 F.2d at 752.

To determine voluntariness, the Court must "consider the totality of the circumstances and determine whether 'the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.'" United States v. Harrison, 34 F.3d 886, 890 (9th Cir. 1994) (citations omitted). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Connelly, 479 U.S. at 167; cf. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("Some of the factors taken into account have included the youth of the accused; his lack of education, or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.") (citations omitted). Although it is possible for a defendant to be in such poor mental or physical condition that he or she cannot rationally waive their rights (and misconduct can be inferred based on police knowledge of such condition, Connelly, 479 U.S. at 167-68), the condition must be so severe that the defendant was rendered utterly incapable of rational choice. United States v. Kelley, 953 F.2d 562, 564 (9th Cir.1992) (collecting cases rejecting claims of physical/mental impairment as insufficient to prevent exercise of rational choice).

4. Defendant's February 7, 2008, Waiver Was Knowing and Voluntary

Here, the totality of the circumstances makes clear that Agent Gallina informed Defendant of his Miranda rights, both orally and in writing, shortly after he was taken into custody and in the presence of other agents. Defendant clearly demonstrated that he understood his rights by acknowledging them orally and by initialing each of the rights listed on the pre-printed waiver of rights form, which was written in English. [Exhibit 3.] It was only after being apprised of his rights and acknowledging his understanding of those rights that Defendant gave a detailed confession. As the Miranda court made clear, "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Miranda, 384 U.S. at 478. Thus, this Court should not suppress Defendant's post-arrest statements.

5. Defendant's August 7, 2007, Waiver Was Knowing and Voluntary

Agent Wilson advised Defendant of his Miranda warnings in English, on August 8, 2007 at approximately 1:00 a.m. using a standard I-214 Miranda rights card. Defendant stated that he understood his rights and agreed to speak with agents. Defendant gave a detailed statement and was subsequently released. A copy of the rights advisement form has been requested and will be provided to the Court upon receipt. There is no indication that Defendant indicated that he did not want to speak to agents or that he was in any way pressured to speak to agents.

G. PRESERVATION OF EVIDENCE

The United States will preserve all evidence to which Defendant is entitled pursuant to the relevant discovery rules. However, the United States objects to Defendant's blanket request to preserve all physical evidence.

The United States has complied and will continue to comply with Rule 16(a)(1)(C) in allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is within his possession, custody or control of the United States, and which is material to the preparation of Defendant's defense or are intended for use by the United States as evidence in chief at trial, or were obtained from or belong to Defendant, including photographs. The United States has made the evidence available to Defendant and Defendant's investigators and will comply with any request for inspection.

Defendant specifically requests that the Government preserve the vehicle driven by Defendant on August 7, 2007. The Government has made inquiries regarding whether the vehicle is still within its control. If the Government has control of the vehicle it will make it available for Defendant's viewing.

C. THE GOVERNMENT WILL CONTINUE TO COMPLY WITH ALL ITS DISCOVERY OBLIGATIONS

The United States intends to fully comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), and Rule 16 of the Federal Rules of

Criminal Procedure. Thus far, the United States has issued 161 pages of discovery and two DVDs. The United States anticipates that most discovery issues can be resolved amicably and informally, and has addressed Defendant's specific requests below.

(1) The Defendant's Statements

The United States recognizes its obligation under Rules 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant the substance of Defendant's oral statements and Defendant's written statements. The Government has produced all of Defendant's written statements that are known to the undersigned Assistant U.S. Attorney at this date and has produced all available videotapes and/or audiotapes. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be provided to Defendant.

The United States has no objection to the preservation of the handwritten notes taken by any of the Government's agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must preserve their original notes of interviews of an accused or prospective government witnesses). However, the United States objects to providing Defendant with a copy of any rough notes at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of those notes have been accurately reflected in a type-written report. See Untied States v. Williams, 291 F.3d 1180 (9th Cir. 2002); see also United States v. Brown, 303 F.3d 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. See United States v. Alvarez, 86 F.3d 901 (9th Cir. 1996); United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in the notes was available in other forms). The notes are not Brady material because the notes do not present any material exculpatory information, or any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Defendant.

(2) Arrest Reports, Notes and Dispatch Tapes

The United States has provided the Defendant with arrest reports. As noted previously, agent rough notes, if any exist, will be preserved, but they will not be produced as part of Rule 16 discovery. The United States is unaware of any dispatch tapes regarding Defendant's apprehension however it has requested with that the agency determine if any such dispatch tapes exsist.

(3) Brady Material

Again, the United States is well aware of and will continue to perform its duty under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment. Defendant, however, is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused, or which pertains to the credibility of the United States' case. As stated in United States v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that "the prosecution does not have a constitutional duty to disclose every bit of information that might affect the jury's decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality." Id. at 774-775 (citation omitted).

The United States will turn over evidence within its possession which could be used to properly impeach a witness who has been called to testify.

Although the United States will provide conviction records, if any, which could be used to impeach a witness, the United States is under no obligation to turn over the criminal records of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such information, disclosure need only extend to witnesses the United States intends to call in its case-in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979).

Finally, the United States will continue to comply with its obligations pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

(4) Sentencing Information

Defendant claims that the United States must disclose any information affecting Defendant's sentencing guidelines because such information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963). The United States respectfully contends that it has no such disclosure obligation under Brady.

The United States is not obligated under Brady to furnish a defendant with information which he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986). Brady is a rule of disclosure, and therefore, there can be no violation of Brady if the evidence is already known to the defendant. In such case, the United States has not suppressed the evidence and consequently has no Brady obligation. See United States v. Gaggi, 811 F.2d 47, 59 (2d Cir. 1987).

But even assuming Defendant does not already possess the information about factors which might affect his guideline range, the United States would not be required to provide information bearing on Defendant's mitigation of punishment until after Defendant's conviction or plea of guilty and prior to his sentencing date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988) ("No [Brady] violation occurs if the evidence is disclosed to the defendant at a time when the disclosure remains in value."). Accordingly, Defendant's demand for this information is premature.

(5) Defendant's Prior Record.

The United States has already provided Defendant with a copy of his criminal record in accordance with Federal Rule of Criminal Procedure 16(a)(1)(B). Defendant was also provided copies of the arrest reports from his prior alien smuggling apprehensions.

(6) Proposed 404(b) Evidence

Should the United States seek to introduce any similar act evidence pursuant to Federal Rules of Evidence 404(b) or 609, the United States will provide Defendant with notice of its proposed use of such evidence and information about such bad act at the time the United States' trial memorandum is filed. Although the United States does not believe Defendant's statement's constitute 404(b) evidence, in an abundance of caution the United States hereby notices Defendant of its intention to introduce the portion of Defendant's statement wherein he conveyed to officers that he has smuggled illegal aliens for the "Calixtos" on numerous prior occasions and that he has done so for the past 2 years. These statements are admissions of a party opponent, however, the statements are also evidence of opportunity, preparation, plan, knowledge, absence of mistake or accident and intent. Moreover, the United States intends to introduce evidence of Defendant's prior apprehensions while smuggling aliens on February 3, 2008 and April 18, 2006, as evidence of opportunity, preparation, plan, knowledge, absence of mistake or accident and intent.

(7) Evidence Seized

The United States has complied and will continue to comply with Rule 16(a)(1)(C) in allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is within the possession, custody or control of the United States, and which is material to the preparation of Defendant's defense or are intended for use by the United States as evidence in chief at trial, or were obtained from or belong to Defendant, including photographs.

The United States, however, need not produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984), cert. denied, 474 U.S. 953 (1985).

(8) Tangible Objects

The Government has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all tangible objects seized that is within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the Government as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The Government need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

(9) Evidence of Bias or Motive to Lie

The United States is unaware of any evidence indicating that a prospective witness is biased or prejudiced against Defendant. The United States is also unaware of any evidence that prospective witnesses have a motive to falsify or distort testimony.

(10) Impeachment Evidence

As stated previously, the United States will turn over evidence within its possession which could be used to properly impeach a witness who has been called to testify.

(11) Criminal Investigation of Government Witness

Defendants are not entitled to any evidence that a prospective witness is under criminal investigation by federal, state, or local authorities. "[T]he criminal records of such [Government] witnesses are not discoverable." United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976); United States v. Riley, 657 F.2d 1377, 1389 (8th Cir. 1981) (holding that since criminal records of prosecution witnesses are not discoverable under Rule 16, rap sheets are not either); cf. United States v. Rinn, 586 F.2d 113, 118-19 (9th Cir. 1978) (noting in dicta that "[i]t has been said that the Government has no discovery obligation under Fed. R. Crim. P. 16(a)(1)(C) to supply a defendant with the criminal records of the Government's intended witnesses.") (citing Taylor, 542 F.2d at 1026).

The Government will, however, provide the conviction record, if any, which could be used to impeach witnesses the Government intends to call in its case-in-chief. When disclosing such information, disclosure need only extend to witnesses the United States intends to call in its case-in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979).

(12) Evidence Affecting Perception, Recollection, Communication or Truth-Telling

The United States is unaware of any evidence indicating that a prospective witness has a problem with perception, recollection, communication, or truth-telling.

(13) Witness Addresses

The United States has already provided Defendant with the reports containing the names of the agents involved in the apprehension and interviews of Defendant. A defendant in a non-capital case, however, has no right to discover the identity of prospective Government witnesses prior to trial. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); United States v. Dishner, 974 F.2d 1502, 1522 (9th Cir 1992) (citing United States v. Steel, 759 F.2d 706, 709 (9th Cir. 1985)); United States v. Hicks, 103 F.23d 837, 841 (9th Cir. 1996). Nevertheless, in its trial memorandum, the United States will provide

Defendant with a list of all witnesses whom it intends to call in its case-in-chief, although delivery of such a witness list is not required. See United States v. Discher, 960 F.2d 870 (9th Cir. 1992); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987).

The United States objects to Defendant's request that it provide a list of every witness to the crimes charged who will not be called as a Government witness. "There is no statutory basis for granting such broad requests," and a request for the names and addresses of witnesses who will not be called at trial "far exceed[s] the parameters of Rule 16(a)(1)(C)." United States v. Hsin-Yung, 97 F. Supp.2d 24, 36 (D. D.C. 2000) (quoting United States v. Boffa, 513 F. Supp. 444, 502 (D. Del. 1980)). The United States is not required to produce all possible information and evidence regarding any speculative defense claimed by Defendant. Wood v. Bartholomew, 516 U.S. 1, 6-8 (1995) (per curiam) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady).

(14) Witnesses Favorable to the Defendant

As stated earlier, the United States will continue to comply with its obligations under Brady and its progeny. At the present time, the United States is not aware of any witnesses who have made an "arguably favorable statement concerning the defendant or who could not identify him or who w[ere] unsure of his identity, or participation in the crime charged."

(15) Statements Relevant to the Defense

To reiterate, the United States will comply with all of its discovery obligations. However, "the prosecution does not have a constitutional duty to disclose every bit of information that might affect the jury's decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality." Gardner, 611 F.2d at 774-775 (citation omitted).

(16) Jencks Act Material

The Jencks Act, 18 U.S.C. § 3500, requires that, after a Government witness has testified on direct examination, the Government must give the Defendant any "statement" (as defined by the Jencks Act) in the Government's possession that was made by the witness relating to the subject matter to which the witness testified. 18 U.S.C. § 3500(b). A "statement" under the Jencks Act is (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). If notes are read back to a witness to see whether or not the government agent correctly understood what the witness was saying, that act constitutes "adoption by the witness" for purposes of the Jencks Act. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). While the United States is only required to produce all Jencks Act material after the witness testifies, the United States plans to provide most (if not all) Jencks Act material well in advance of trial to avoid any needless delays.

(17) Giglio Information

As stated previously, the United States will comply with its obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and Giglio v. United States, 405 U.S. 150 (1972).

(18) Agreements Between the Government and Witnesses

The United States has not made or attempted to make any agreements with prospective Government witnesses for any type of compensation for their cooperation or testimony.

(19) Informants and Cooperating Witnesses

At this time, the United States is not aware of any confidential informants or cooperating witnesses involved in this case. The United States must generally disclose the identity of informants where (1) the informant is a material witness, or (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court may, in some circumstances, be required to conduct an in-chambers inspection to determine whether disclosure of the informant's identity is required under Roviaro. See United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is a confidential informant somehow involved in this case, it will either disclose the identity of the informant or submit the informant's identity to the Court for an in-chambers inspection.

In this case, the UPS driver provided information to Border Patrol Agents regarding his observation of Defendant's alien smuggling activities, prior to Defendant's apprehension. The Government does not know at this time if the Border Patrol Agents obtained his name of identification.

(20) Residual Request

The United States has already complied with Defendant's request for prompt compliance with its discovery obligations. The United States will comply with all of its discovery obligations, but objects to the broad and unspecified nature of Defendant's residual discovery request.

C. THE GOVERNMENT DOES NOT OPPOSE LEAVE TO FILE FURTHER MOTIONS, SO LONG AS THEY ARE BASED ON NEW EVIDENCE

The United States does not object to the granting of leave to allow Defendant to file further motions as long as the additional motions are based on newly discovered evidence or discovery provided by the Government subsequent to the instant motion at issue.

IV.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motions except where not opposed, be denied.

DATED: April 8, 2008.

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

S/ A. Dale Blankenship
A. DALE BLANKENSHIP
Assistant United States Attorney
Attorneys for Plaintiff
United States of America
Email: Dale.Blankenship@usdoj.gov

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR0547-JM
	)	
Plaintiff,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
RICARDO IVAN PALOS-MARQUEZ,	)	
	)	
Defendant.	)	
	)	

IT IS HEREBY CERTIFIED THAT:

I, A. DALE BLANKENSHIP, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:**

1) DISMISS COUNT ONE DUE TO VINDICTIVENESS;

2) SUPPRESS EVIDENCE OF AUGUST 7, 2007, VEHICLE STOP;

3) SUPPRESS EVIDENCE OF FEBRUARY 7, 2008, VEHICLE STOP;

4) DISMISS INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY;

5) SUPPRESS STATEMENTS;

6) PRESERVE EVIDENCE;

7) COMPEL DISCOVERY; AND

8) GRANT LEAVE TO FILE FURTHER MOTIONS.

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Erick Guzman, Esq. Eric_Guzman@fd.org

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 8, 2008.

s/ A. Dale Blankenship

A. DALE BLANKENSHIP